FILED
JUN 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1954—NO. 647 MISC.

GAVOER MANHAT,

Petitioner,

against

UNITED STATES OF AMERICA and PROJECT CONSTRUCTION CORPORATION,

Respondents,

and

PROJECT CONSTRUCTION CORPORATION and STUART MARINE PAINTING CORPORATION,

Impleaded-Respondents.

BRIEF OF STUART MARINE PAINTING CORPORATION, RESPONDENT-IMPLEADED, RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

EDMUND F. LAMB,
Proctor for Stuart Marine Painting Corporation.

VINCENT A. CATOGGIO,
Advocate.

Dated, June 6th, 1955.

Supreme Court of the United States

OCTOBER TERM 1954—No. 647 MISC.

GAVOER MANHAT,
Petitioner,
against
UNITED STATES OF AMERICA and PROJECT CONSTRUCTION CORPORATION,
Respondents,
and
PROJECT CONSTRUCTION CORPORATION and STUART MARINE PAINTING CORPORATION,
Impleaded-Respondents.

BRIEF OF STUART MARINE PAINTING CORPORATION, RESPONDENT-IMPLEADED, RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

Statement.

Libellant petitioner never has sought and does not seek any direct relief against his employer, this respondent, Stuart Marine Painting Corporation. Such relief, in any event, is barred under the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. 905.

Because indemnity and judgment over against Stuart Marine Painting Corporation has been sought in pleadings by the respondents, the United States of America and Project Construction Corporation, therefore the instant respondent, Stuart Marine Painting Corporation has a direct interest in the present proceeding.

Assuming as we understand, that all respondents to the petition herein are required to file their briefs within 30 days of the filing of the petition under Rule 38, par. 3, of

this Court, we are in doubt as to whether 1, either the United States of America or Project Construction Corporation may present to this Court for determination the question concerning their claims for indemnity over against Stuart Marine Painting Corporation and 2, if they should, will Stuart Marine Painting Corporation be allowed an additional 30 days to answer such claims over as may be made.

Of course, should the petition for certiorari herein be denied, then no need will exist for considering the question of indemnity should it be presented. Since this is so, the question whether the petition herein should be denied or not directly affects the rights of the respondent-impleaded, Stuart Marine Painting Corporation.

POINT I.

The petition seeks nothing more than a trial of the facts *de novo*.

The petition, after enumerating eight alleged questions presented for review, argues principally why its proof should have been accepted.

Petitioner's argument is not that any of the gear or equipment of the ship was defective and the vessel unseaworthy. It is rather that because the ship's properly functioning and operating gear and equipment (the accident lifeboat and its Rottmer-type releasing gear) were instruments involved in injury to the petitioner, the ship was unseaworthy.

That the lifeboat and its supports and the Rottmer-type releasing gear were in proper working order, was established by a preponderance of the evidence according to the finding of the District Court and according to the opinion of the Court of Appeals. The petitioner does not and cannot conscientiously question the accuracy of these findings.

The petitioner, in the District Court and in the Court

of Appeals rested his claim in the main on an alleged custom and practice to secure *all* lifeboats with additional lashings when they are suspended over the side of a vessel. The District Court found as a fact that this was not established and the Court of Appeals affirmed this view of the evidence. Judge MEDINA said in the Court of Appeals:

> "As the apparatus was in proper working order and free from any defects by way of design or otherwise and the precipitation of the lifeboat to the pier was caused by the carelessness of one of the painters, the trial court was compelled to find as it did that the machinery was in all respects properly constructed and maintained and that nothing about the apparatus itself justified an inference of unseaworthiness; and none of the authorities cited holds anything to the contrary."
>
> * * * * *
>
> "The preponderance of evidence adduced at the trial fully supports the trial court's determination that the prospect of the falling of a lifeboat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man. It seems clear, beyond cavil, that the three workmen were familiar with the operation of the releasing mechanism and that they were given ample warning of the danger inherent in moving the handle. Under no theory could a standard be considered reasonable which imposed upon the shipowner a duty to safeguard absolutely against the possibility that the handle would be moved by one of these men. The fact that past experience had proved that it is virtually impossible for the hooks to open unless the lever is moved in the required arc (165° to 170°), that the mechanism had passed an inspection only two and one-half weeks earlier and had functioned perfectly for more than

twenty-four hours preceding the accident negates any inference that the respondents were derelict in not taking additional precautions against the possibility of malfunction of the apparatus.

The principal factual issue contested at the trial was whether or not there was a custom or practice to permit work in lifeboats, when in port, only while the boats were in their cradles or when protected from a possible fall by lashings, sometimes described as 'stoppers' or 'preventers,' or by 'mousing' the releasing hooks. Libellant relied on a number of witnesses who testified that lashings were always used, also upon certain excerpts from a Coast Guard publication used in the instruction of those desiring certificates as lifeboatmen or ABs, and further testimony that some of the other lifeboats on this very vessel were lashed when work was done upon them overside in port. It is claimed by appellant that certain evidence was erroneously excluded, and we shall discuss that point later.

The difficulty with appellant's position on this crucial question of fact is that respondents produced a number of experts of wide experience who testified in effect that it was true that lashings were often used, but that the practice was confined to occasions when work was being done on the falls or on the releasing machinery and that no lashings were customarily used when jobs like cleaning and painting of the lifeboats were in progress.

The trial judge followed all this evidence with scrupulous care and attention and his conclusion that no such custom or practice existed, as was contended for by appellant, was based largely on the credibility of witnesses who testified in open court, and is amply supported by the evidence. What it all boiled down to is the difference between the exercise of reasonable care, on the one hand, as contrasted with the taking of every conceivable precaution or adherence to the highest standard of care, on the other."

* * * * *

"But the so-called 'Manual' did not purport to nor did it contain authoritative requirements or regulations. Its contents were not nor were they required to be published in the Federal Register, and it seems to have been no more than a quiz book for those taking the examinations for certificates as lifeboatmen or as ABs. The excerpts which were admitted were contained in the part of the 'Manual' addressed to those desiring to take the examination for certification as lifeboatmen and the excluded excerpts in the part entitled 'Suggestions for Seamen.'

In view of the liberality which generally prevails in trials before an admiralty judge, sitting without a jury, these items of proof might well have been received, but their probative value in the light of the record as a whole would have been negligible. We cannot say that the rulings as made materially prejudiced libellant's rights or that they justify a reversal of the decree, as it is clear that the trial judge would have arrived at the same conclusion in any event."

What the petitioner in effect is therefore trying to accomplish is to obtain a retrial of the factual evidence, a trial *de novo*.

CONCLUSION.

The petition should be rejected and certiorari should be denied.

Respectfully submitted,

EDMUND F. LAMB,
Proctor for Stuart Marine Painting Corporation.

VINCENT A. CATOGGIO,
Advocate.

Dated, June 6th, 1955.